Alliance Bank Malaysia Bhd (formerly known as Multi Purpose Bank Bhd) v Mejati Communications Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5-22-718 OF 2002
JAMES FOONG J
14 AUGUST 2003

Civil Procedure *— Pleadings — Striking out — Application made under specific provision confined references only to pleadings and nothing else — Whether annexture to charge filed in a different application allowed as admissible evidence — Whether court's inherent jurisdiction to refer to certain evidence other than pleadings filed allowed— Rules of the High Court 1980 O 18 r 19(1)(a), O 92 r 4*

This was the second defendant's appeal against the decision of the senior assistant registrar in dismissing his application to strike out the plaintiff's entire pleadings and endorsement in the writ under O 18 r 19(1)(a) of the Rules of the High Court 1980 ('the RHC') or the inherent jurisdiction of the court provided by O 92 r 4 of the RHC. No affidavit in support was filed in this application. The second defendant, the registered owner of a piece of property, had charged it to the plaintiff as security for a loan. Due to the default in repayment of the loan, the plaintiff made this claim against him. In applying to strike out the plaintiff's pleadings, the second defendant sought to refer the court to an annexture to the charge which was filed in an earlier application by the plaintiff. The second defendant's intention was to show that the charge was a third party charge and thus, exempted him from any liability to the plaintiff other than that concerning the charge property. The issue for determination was whether the annexture to the charge should be allowed as admissible evidence by virtue of the inherent jurisdiction of the court in view of the second defendant's application made under the specific provision of O 18 r 19(1)(a) of the RHC whereby it prohibited the use of any evidential materials other than the pleadings for consideration in such application.

Held, dismissing the defendant's appeal with costs:

(1) The affidavit referred to must be excluded for it contained evidence. Otherwise, the utilization of this process will be defeated. When the second defendant chose to proceed by this procedure (O 18 r 19(1)(a) of the RHC) then he must confine his reference to the pleadings and no others. Once an application is commenced under O 18 r 19(1)(a) of the RHC then, except for the pleadings, all other evidence introduced by whatever means must be denied reference. Upon examining the pleadings, the court found no justification in striking out the plaintiff's claim. It disclosed a cause of action against the second defendant since the second defendant had given a security in the form of charging his land to the plaintiff (see p 588H - 589A).

(2) When the applicant elected to proceed under O 18 r 19(1)(a) of the RHC, then he must confine himself to the demands and restrictions specified therein. Otherwise, if the court was to come to his aid with O 92 r 4 of the RHC by using other evidential materials, then there would be no exclusivity in an application made under O 18 r 19(1)(a) of the RHC. If other evidential material was allowed to be introduced, such respondent might be deprived of an opportunity to adduce other evidential material to counter that used by the applicant (see p 589F -H); *Supputetchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368 not followed.

[Bahasa Malaysia summary

Ini adalah rayuan defendan kedua terhadap keputusan penolong kanan pendaftar yang telah menolak permohonan beliau untuk membatalkan keseluruhan pliding dan pengindorsan writ plaintif di bawah A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atau bidang kuasa sedia ada mahkamah yang diperuntukkan oleh A 92 k 4 KMT. Tiada afidavit sokongan telah difailkan dalam permohonan ini. Defendan kedua, tuanpunya berdaftar sekeping hartanah, telah mencagarkannya kepada plaintif sebagai jaminan untuk satu pinjaman. Oleh sebab kegagalan untuk membayar balik pinjaman tersebut, plaintif telah membuat tuntutan ini terhadap beliau. Dalam memohon untuk membatalkan pliding plaintif, defendan kedua telah memohon untuk mahkamah merujuk kepada satu lampiran kepada gadaian yang telah difailkan dalam satu permohonan terdahulu oleh plaintif. Niat defendan kedua adalah untuk menunjukkan bahawa gadaian tersebut adalah satu gadaian pihak ketiga dan oleh itu, mengecualikan beliau daripada apa-apa liabliti terhadap plaintif selain daripada yang berkenaan gadaian hartanah tersebut. Persoalan untuk ditentukan adalah sama ada lampiran kepada gadaian tersebut patut dibenarkan sebagai keterangan boleh terima menurut bidang kuasa sedia ada mahkamah berdasarkan permohonan defendan kedua yang telah dibuat di bawah A 18 k 19(1)(a) KMT di man ia melarang penggunaan apa-apa bahan-bahan keterangan selain daripada pliding-pliding untuk dipertimbangkan dalam permohonan sedemikian.

Diputuskan, menolak rayuan defendan dengan kos:

(1) Afidavit yang dirujuk hendaklah dikecualikan kerana ia mengandungi keterangan. Jika tidak, penggunaan proses ini akan gagal. Apabila defendan kedua memilih untuk memulakan dengan prosedur ini (A 18 k 19(1)(a) KMT) maka beliau hendaklah membataskan rujukan beliau kepada pliding-pliding tersebut dan itu sahaja. Apabila suatu permohonan telah dimulakan di bawah A 18 k 19(1)(a) KMT maka, kecuali untuk pliding-pliding tersebut, semua keterangan lain untuk apa maksud sekalipun hendaklah dinafikan rujukannya. Setelah meneliti pliding-pliding tersebut, mahkamah mendapati tiada justifikasi untuk membatalkan

A tuntutan plaintif tersebut. Ia mendedahkan satu kausa tindakan terhadap defendan kedua memandangkan defenda kedua telah memberikan satu gadaian dalam bentuk menggadaikan tanah tersebut kepada plaintif (lihat ms 588H - 589A).

(2) Apabila pemohon memilih untuk memulakan permohonan di bawah A 18 k 19(1)(a) KMT, maka beliau hendaklah membataskan diri beliau kepada tuntutan-tuntutan dan batasan-batasan yang telah ditetapkan. Jika tidak, sekiranya mahakamah membantu beliau dengan A 92 k 4 KMT dengan menggunakan bahan-bahan keterangan, maka tiada sifat eksklusif dalam suatu permohonan yang dibuat di bawah A 18 k 19(1)(a) KMT. Sekiranya bahan keterangan lain dibenarkan untuk dikemukakan, responden mungkin akan terkilan terhadap satu peluang untuk mengemukakan bahan keterangan lain bagi membangkang apa yang digunakan oleh pemohon (lihat ms 589F -H); *Supputetchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368 tidak diikut.]

Notes

For cases on striking out of pleadings, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4677–4737.

Cases referred to

Supputetchimi v Palmco Bina Sdn Bhd [1994] 2 MLJ 368 (not folld)

Legislation referred to

Rules of High Court 1980 O 18 r 19(1)(a), (2), O 92 r 4

Steven KP Puung (*Isharidah, Ho, Chong & Menon*) for the plaintiff.
Lourdes Abishegam a/l Arrulsamy (*Ngeh & Co*) for the second defendant.

James Foong J:

Introduction

This is an appeal by the second defendant against the decision of the learned senior assistant registrar who dismissed his application in encl 7.

Enclosure 7 is an application by the second defendant to strike out the plaintiff's entire pleadings and endorsement in the writ filed against him under O 18 r 19(1)(a) of the Rules of High Court 1980 ('the RHC') or 'di bawah bidangkuasa sedia ada Mahkamah Mulia ini'.

Adhering to O 18 r 19(2) of the RHC, no affidavit was filed in support of this application.

The test to be applied

To consider such application, the test is as follows:

> It is firmly established that the power exercise under rule 4 (the precursor to Order 18 r 19) 'is only appropriate in cases which are plain and obvious so that

a judge can say at once that a statement of claim as it stands is sufficient, even if proved, to entitle the plaintiff to the relief of which he asks for' ... Where the situation arises, the pleadings and particulars alone shall be considered and all the allegations in it shall be presumed to be true, and it is only on that assumption that any suitable case can be made for this application.The court cannot and indeed is not empowered to look behind the pleadings and particulars if it discloses a reasonable cause of action. So long as the statement of claim discloses some ground of action the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for it to be struck out (see *Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor and another appeal* [1998] 2 MLJ 498 at p 501.

Analysis

In this case, the statement of claim against the second defendant alleges that the second defendant being the registered owner of a piece of property had charged it to the plaintiff as security for a loan given to the first defendant by the plaintiff. And due to the default in repayment of the loan, the plaintiff gave notice to the defendants to repay. Since the second defendant failed to comply with the notice for repayment this claim against the second defendant is made.

In the statement of defence, the second defendant admits that he had charged the said property to the plaintiff but only as security for the loan granted to the first defendant. At no time, the second defendant insists, was he a guarantor. Since the said property is charged to the plaintiff, the plaintiff's claim against him is only in respect of the property and not himself personally.

At the hearing before me, the parties invited me to refer to the annexture to the charge over the said property created by the second defendant in favour of the plaintiff. This document is inserted as an exhibit in an affidavit of the plaintiff under a different application for summary judgment against all the defendants. The intention of the second defendant in this exercise is to expose to this court that the said charge is a third party charge, thus exempting the second defendant from any liability to the plaintiff other than that concerning the charge property itself. But realizing that this application before me is confined to striking out the plaintiff's claim against the second defendant for failure to disclose a reasonable cause of action under O 18 r 19(1)(a) of the RHC and, where no evidence shall be admissible under O 18 r 19(2) of the RHC, and, of which no affidavit is filed in this application, I have to exclude this document for consideration. My concentration must be restricted to only the pleadings of the case. The affidavit referred to must be excluded for it contains evidence. Otherwise, the utilization of this process will be defeated. When the second defendant chose to proceed by this procedure (O 18 r 19(1)(a) of the RHC) then he must confine his reference to the pleadings and no others. If the affidavit where the relevant exhibit is referred to supports his argument, then other processes in O 18 r 19(1) of the RHC must be used. But once an application is commenced under O 18 r 19(1)(a) of the RHC then, except for the pleadings, all other evidence introduced by whatever means must be denied reference.

A Upon examining the pleadings as it stands, I find no justification in striking out the plaintiff's claim. It discloses a cause of action against the second defendant since the second defendant had given a security in the form of charging his land to the plaintiff. As to whether the security will exempt the second defendant from liability to the plaintiff, evidence must be introduced to reveal its nature; and the terms and conditions therein must be scrutinized. B Perhaps, when such matters are revealed, then on points of law, the claim against the second defendant may fail. But until then, the claim against the second defendant by the plaintiff must stand since the pleadings itself discloses a cause of action against the second defendant.

Realizing the shortcomings stated above, counsel for the second C defendant attempted to influence me with High Court decision of *Suppuletchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368. There the learned judge used the inherent jurisdiction of the court provided by O 92 r 4 of the RHC to refer to certain evidence other than the pleadings to decide on an application filed under O 18 r 19(1)(a) of the RHC. With upmost respect to the learned judge, I am not convinced as to whether such approach is D wise. In the first place, this overrides a specific provision (O 18 r 19(1)(a) of the RHC) which is designed to cater for a specific purpose. Secondly, the express provision of O 18 r 19(2) of the RHC, prohibits the use of any evidential materials other than the pleadings for consideration in such application. To go beyond this, may not only contravene an explicit provision of the procedural law but also compel the court to examine other E materials besides the pleadings. Then to what limit and extent this process of examination involve is difficult to determine. If there is such a need to consider other evidential materials besides the pleadings, it is not imperative upon the applicant to proceed under O 18 r 19(1)(a) of the RHC. There are three other processes under O 18 r 19(1) of the RHC available to an F applicant for use to strike out a claim against him with the use of evidential materials other than the pleadings. But when the applicant elects to proceed under O 18 r 19(1)(a) of the RHC, then he must confine himself to the demands and restrictions specified therein. Otherwise, if the court is to come to his aid with O 92 r 4 of the RHC by using other evidential materials, then there will be no exclusivity in an application made under O G 18 r 19(1)(a) of the RHC. In addition, one may question the procedural fairness of this approach (using O 92 r 4 of the RHC) when the respondent to an application under O 18 r 19(1)(a) of the RHC only comes prepared to answer a charge on the effects of the pleadings upon the applicant. If other evidential material is allowed to be introduced such respondent may be deprived of an opportunity to adduce other evidential material to counter H that used by the applicant.

Conclusion

By reasons aforesaid, I hereby dismiss the second defendant's appeal with cost.

Defendant's appeal dismissed with costs.

I Reported by Ezatul Zuria Azhari